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No. 483.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHARLES E. BOINEAU, JR., et al., *Appellants*

v.

O. FRANK THORNTON, Secretary of State of South Carolina, et al., *Appellees*

On Appeal From the United States District Court for the Eastern District of South Carolina

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PETITION FOR REHEARING

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CITATIONS

Cases:	Page
Aptheker v. Secretary of State, 378 U.S. 500	16
Blackman v. Stone, 300 U.S. 641	4
Brannen v. Perkey, 31 S.E. 2d 898	12
Brown v. Baskin, 78 F. Supp. 933	22, 25
Cooper v. Aaron, 358 U.S. 1	24
Easler v. Blackwell, 10 S.E. 2d 160, 195 S.C. 15	12
Edwards v. California, 314 U.S. 160	26
Elgin, Joliet & Eastern Ry. Co. v. Bailey, 325 U.S. 711, 326 U.S. 801, 327 U.S. 661	7
Ex parte Yarbrough, 110 U.S. 651	10, 15
Farrell v. Hicken, 125 Minn. 407, 147 N.W. 815	31
Fortson v. Dorsey, No. 178, October Term, 1964, Supreme Court of the United States	6, 7, 19, 20, 33
Fortson v. Toombs, No. 300, October Term, 1964, Supreme Court of the United States	6, 7, 19, 20, 33
Graves Mfg. Co. v. Lynde Co., 336 U.S. 271, 337 U.S. 910, 339 U.S. 605	7
Gray v. Sanders, 372 U.S. 368	3, 4, 6, 15, 18
Griffin v. Tropp, 53 S.E. 2d 92, 205 Ga. 176	11, 12
Goesaert v. Cleary, 335 U.S. 464	24
Gomillion v. Lightfoot, 364 U.S. 339	2, 3, 17, 18, 19
Harman v. Forssenius, No. 360, October Term, 1964, Supreme Court of the United States	31
Kansas City v. Whipple, 385 S.W. 295, 136 Mo. 47	12
Kinsella v. Krueger, 351 U.S. 487, 352 U.S. 813, 354 U.S. 1	7
Kotch v. Pilot Comm'rs, 330 U.S. 552	32
Lane v. Wilson, 307 U.S. 268	25
Lucas v. Colorado General Assembly, 377 U.S. 713	5, 25
Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656	19
Minor v. Happersett, 21 Wall. 162	10
NAACP v. Batton, 371 U.S. 415	16
Orpen v. Watson, 87 N.J.L. 69, 93 A. 853	31
People v. Deatherage, 81 N.E. 2d 581	12
Perez v. Sharp, 32 Cal. 2d 711, 191 P. 2d 17	32
Petition of Wade, 121 A. 2d 551, 30 N.J. Super. 510	13, 23

Page

Redfearn v. Board of State Canvassers, 101 S.E. 2d 10, 234 S.C. 113 12
Reid v. Covert, 351 U.S. 487, 352 U.S. 813, 354 U.S. 1 .. 7
Reynolds v. Sims, 377 U.S. 533 ..... 2, 3, 4, 5, 6, 10, 11, 16, 18, 20, 25, 29
Rice v. Elmore, 165 F. 2d 387, cert. den. 333 U.S. 875 .. 22, 25
Rochin v. California, 342 U.S. 165 3
Scranton v. Drew, No. 201, October Term, 1964, Supreme Court of the United States 6, 7, 19, 20, 33
Slaughterhouse Cases, 16 Wall. 36 ..... 10, 32
Smith v. Texas, 311 U.S. 128 24
Thornhill v. Alabama, 310 U.S. 88 16
Truax v. Corrigan, 257 U.S. 312 24
Truax v. Raich, 239 U.S. 33 27
U. S. v. Bathgate, 346 U.S. 220 16
U. S. v. Mosley, 238 U.S. 383 33
Wesberry v. Sanders, 376 U.S. 1 5
West Virginia Board of Education v. Barnette, 319 U.S. 624 ..... 11, 13-14
Winters v. New York, 333 U.S. 507 16
Yick Wo v. Hopkins, 118 U.S. 356 11

STATUTES:

§ 15.15.360(3) Alaska Statutes (Michie, 1962) 23
§ 3-1006 Arkansas Statutes (1956) 23
§ 11-64 Hawaii Rev. Statutes (1955) 23
§ 23-357, South Carolina Code 6, 7, 8, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33
§ 24-266, Virginia Statutes (Michie, 1950) 23

OTHER AUTHORITIES:

Cooley, *Constitutional Limitations* (8th ed., 1926) ... 12
Dewey, *Intelligence in the Modern World: John Dewey's Philosophy* (Mod. Lib. ed., 1939) 8
Fortescue, *De Laudibus Legum Angliae* (Ca 1470) .. 8
Greenberg, *Race Relations and American Law* (1959) 22
Hacker, *Congressional Districting* (1963) 18
Meiklejohn, *Political Freedom* (1960) 14
Sabine, *A History of Political Theory* (2d ed., 1950) .. 8
Stephenson and Marcham, *Sources of English Constitutional History* 9

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PETITION FOR REHEARING

Now come Charles E. Boineau, Jr., William L. Turbeville, and Dolores R. Ellis and respectfully pray the Court to grant rehearing in this cause, and that the cause be set down for argument on the regular calendar.

It is said that hard cases make bad law. So, perhaps, may deceptively simple cases, in which the appearance of simplicity is contributed to by a lower Court decision which proceeds upon incorrect unexpressed premises and which treats the issues of the cause *simpliciter*. Such, appellants respectfully submit, is this case, be-

cause the District Court has for the most part treated the rights of voters as dependent upon, or at least a function of, the nature and rights of the candidates, a premise which is manifestly a false start which when pursued necessitates fallacious conclusions. In so doing, the District Court made its decision in terms which, with the authority of affirmance by this Court, constitute a landmark holding of catastrophic proportions upon the scope of the First Amendment, establish a major lin itation on *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and necessitate a major distinction from *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). In addition, the District Court decision embodies the novel proposition that the equal protection clause has no inhibiting force upon cumulating inequalities of burden upon voting rights unless any of them, standing alone, constitutes invidious discrimination. Appellants urge that the consequences, both in South Carolina and throughout the United States, of the District Court decision clearly deserve plenary consideration by this Court, because the District Court fairly establishes the following constitutional propositions:

1. That the right of a voter to choose among candidates, including the right freely to choose not to vote or to vote against any, is not protected by the First Amendment. To conceive of the First Amendment in these terms, appellants contend, is no less than to hold that means are protected while the major end for which these protected means exist is not protected. This view reduces the First Amendment to absurdity.

2. That *Reynolds* and the related reapportionment cases are to be read narrowly as having application only in the limited circumstance in which denial of equality of voting rights results from the creation of unequally

populated geographic areas as the basis for representation. So to read *Reynolds*, in the light of its application of the philosophy of "one man, one vote" enunciated by *Gray* v. *Sanders*, 372 U.S. 368 (1963), creates the paradox that the equal protection clause protects equality of voting rights as among areas, but not as among individuals within the same geographical area.

3. That denial of equal voting rights by a gerrymander of inclusion is not forbidden by the Constitution, including the Fifteenth Amendment, that the principle of *Gomillion* applies only to the gerrymander that excludes. In this regard, the present case squarely raises the issue whether the Fourteenth Amendment affords to all the same protection, as to gerrymandering by the reverse means, which the Fifteenth extends to Negroes under the specific circumstances of Gomillion. If the Fifteenth protects against the gerrymander by inclusion, are the voting rights of Negroes held to be greater than those of others?

4. That existence of a cumulation of undue burdens and consequent inequalities of voting rights is not to be considered in determining the application of the equal protection clause, so long as each separate burden is not sufficiently great to constitute invidious discrimination. So to hold reduces the protection afforded the voter by the clause to that minimum level which shocks the conscience. Cf. *Rochin* v. *California*, 342 U.S. 165 (1952).

It can require no argument to show that the fundamental nature of the right to vote imbues the propositions thus decided by affirmance of the District Court with grave consequences to the Nation's political system and its democratic institutions. While it may be that the Constitution requires the conclusions drawn by

the District Court, they manifestly invoke the most deliberate consideration before that constitutional compulsion is established. "[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 562.

Appellants emphasize that they bring this action not only as candidates, which two are, but as qualified voters, in their own behalf and in behalf of others similarly situated. Questions of far greater importance are raised by appellants in this capacity than in their capacity as candidates—questions which affect fundamentally the rights of voters regardless of party, and regardless of State of residence. While the opinion of the District Court, together with Appellees' Motion to Affirm, have given the misleading impression that this is a partisan action, such is by no means the case. And while Appellants' contentions as to their rights as candidates may, *arguendo*, be mooted by the election to be held on November 3, 1964, such is *not* the case with the contentions raised as to deprivation of rights as voters, for themselves and others similarly situated. After the election the act "remains in force and if the complaint were dismissed it would govern future election." *Gray* v. *Sanders*, 372 U.S. 368, 376 (1963). A cause may become moot only in part. *Blackman* v. *Stone*, 300 U.S. 641 (1937). And, if the rights of voter remain in question after the election as they do, the alleged "avoidability" of the denial of those rights upon the contingent acts of a political party organization is shown to have no effect upon the rights of the voters. The District Court's theory that denial of claimed voting rights, *while admitting that such a denial in fact exists*, could have been avoided in the coming election

by the action of a party nominating convention, is in actuality merely commending the denial of the voters' rights to a political remedy. This theory is precisely the same as though the Supreme Court in *Reynolds* v. *Sims*, 377 U.S. 533 (1964) had told the voters of Alabama to achieve equality of voting weight by moving from an overrepresented to an underrepresented political division. But the teaching of that case and of *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736-737 (1964) is that the existence of a political remedy is irrelevant in the consideration of alleged denial of voting rights.

Indeed, because of this very irrelevance, the decision of the District Court based upon a political remedy is no more that the question-begging reiteration of the political question doctrine upon the same ground found inadequate when phrased as "want of equity" in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964). Viewed in this light, the District Court is sowing confusion as to the applicability of *Wesberry* in cases involving State elections. Appellants had believed that this question was answered by *Reynolds* and by *Lucas* to the effect that cases involving the rights of voters in State elections were subject to the same standards of justiciability as those in Federal elections. Appellants urge that the District Court's decision, although ostensibly on the merits, was in actuality predicated upon assumptions regarding the political question doctrine which cast doubt upon the effect of existing political remedies which were laid to rest by *Wesberry*, *Reynolds* and *Lucas*.

The opinion of the District Court and the Appellees' Motion to Affirm likewise create the misleading impression that Appellants' concern is limited to the application of the equal protection clause of the Fourteenth

Amendment to the statute. This is far from the case: not only are issues regarding the equality of the effect of § 23-357, South Carolina Code, raised, but the even more fundamental question whether equality of voting power is meaningful without freedom of choice for the voter. Appellants contend that the effective equality of voting weight which this Court has required in *Gray* v. *Sanders*, 372 U.S. 368 (1963) and *Reynolds* v. *Sims*, 377 U.S. 533 (1964), as well as other cases relating to apportionment of state legislatures, is predicated upon the assumption of absolute liberty of choice by qualified voters among the available candidates. Recognition of the complementarity of freedom and equality of voting could hardly be more explicit than the statement that "the right to vote freely for the candidate of one's choice is of the essence of a democratic society and *any restrictions* on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U.S. 533, 545 (1964) (Emphasis added.) It would be little less than tragic if this Court's affirmance without argument, of the District Court's decision refusing to follow this doctrine, were to be read as a retreat from or qualification of its position in *Reynolds*.

An equally important proposition urged for the Court's consideration arises from the nature of several other cases which like *Boineau* v. *Thornton*, involve questions relating to the application of *Reynolds*. These are *Fortson* v. *Dorsey*, No. 178, October Term, 1964, and *Fortson* v. *Toombs*, No. 300, October Term, 1964, in which probable jurisdiction was noted on October 5, 1964; and *Scranton* v. *Dre* , No. 201, October Term, 1964, upon which the Court has not as yet acted. *Boineau* v. *Thornton* relates to these cases in that it,

like *Fortson* and *Scranton*, involves the question of a denial of voters' rights which arises out of the existence of multi-member districts for the choice of State legislators. As appears more fully below, Appellants contend that affirmance without argument of *Boineau* v. *Thornton*, necessarily involves the assumption voters' rights do not in any event depend upon the existence of such multi-member districts. Without such at-large elections, § 23-357 would have no effect other than as it relates to determination of voter intent. This fundamental relationship suggests that *Boineau* should be argued together with *Fortson* and with *Scranton* should the Court find probable jurisdiction in the latter.

This petition is not brought lightly, but out of deep conviction of the importance of the issues involved, especially grave among these being the question of compelled voting. This question is too significant to be decided on the merits by summary affirmance of the District Court decision without argument, because of the weight of authority accorded an affirmance.

Plenary consideration would appear to be amply warranted alone by the question of the protection of the right of choice in voting under the First Amendment, clearly of greater public importance throughout the Nation than questions involved in other cases in which rehearing was granted after plenary consideration and after announcement of opinions, *Elgin, Joliet & Eastern Ry. Co.* v. *Bailey*, 325 U.S. 711, 326 U.S. 801, 327 U.S. 661; *Graves Mfg. Co.* v. *Lynde Co.*, 336 U.S. 271, 337 U.S. 910, 339 U.S. 605, and of public importance at least equal to those involved in *Reid* v. *Covert* and *Kinsella* v. *Krueger*, 351 U.S. 487, 352 U.S. 813, 354 U.S. 1.

I.

Liberty of political choice is guaranteed by the First and Fourteenth Amendments, and is denied by § 23-357, South Carolina Code, which compels voters to vote for a fixed number of candidates.

The fundamental postulate upon which American political institutions rest is that governments derive "their just powers from the consent of the governed." Declaration of Independence. This political postulate rests upon the belief that "no man or limited set of men is wise enough or good enough to rule others without their consent." Dewey, *Intelligence in the Modern World: John Dewey's Philosophy*, 400-401 (Mod. Lib. ed., 1939). That consent lies as the foundation of legitimate government is at least as ancient in Anglo-American law as 1470. "[The king] cannot alter the laws, or make new ones, without the express consent of the whole kingdom in Parliament assembled." Fortescue, *De laudibus legum Angliae*, Ch. XXXVI, (ca. 1470). The function of the election of representatives, by whoever might be qualified to vote under prevailing laws from Lancastrian Parliament to the present day, is the derivation of the consent of the governed to the framing of laws by their representatives. It is so apparent as to be axiomatic that if the consent of the governed is to be effective, it must be freely given. Compelling consent to be governed by this or that representative is tantamount to Rousseau's philosophy of "forcing a man to be free." And "forcing a man to be free is a euphemism for making him blindly obedient to the mass or stronger party." Sabine, *A History of Political Theory*, 591 (2d ed., 1950).

Indeed, the freedom of electoral choice in English law antedates the Lancastrian formulation of the theory

of the consent of the governed. In 1406, abuse and favoritism in the election of knights of the shire were the subject of statutory regulation: "all who are there present, as well suitors duly summoned for this purpose as others, shall attend to the election of their knights for the parliament, then freely and impartially proceeding with that election, any command or request to the contrary notwithstanding." 7 Henry IV: On Elections to Parliament (1406) (Stephenson and Marcham, *Sources of English Constitutional History*, 276). Electors were charged to "make open and free election according to law" upon the Stuart accession. James I: Proclamation concerning Elections (1604) (Stephenson and Marcham, *op. cit.*, 407). The great Bill of Rights of 1689 among its remonstrances, held "that election of members of parliament ought to be free." Stephenson and Marcham, *op. cit.*, 601 (1689). Upon acceptance by William and Mary, the Bill became 1 William and Mary, St. 2, C.2. There seems at no time since the Bill of Rights to have been a question as to the freedom of electoral choice. So completely had this fundamental freedom been absorbed into Anglo-American law by the time of the Revolution and thereafter that it seems never again to have been the subject of debate. Rather, the debate regarding suffrage that continued from the Revolution to the Nineteenth Amendment was with regard to property or other qualifications for its exercise.

A. The freedom of the voter to choose among candidates, to vote for persons not candidates, to vote against rather than for, or not to vote at all is guaranteed by the First and Fourteenth Amendments.

With reference to election of United States officers, the Court has said: "it is the duty of that government

to see that he [the voter] may exercise this right freely .... This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself . . : that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." *Ex parte Yarbrough*, 111 U.S. 651, 662 (1884). The right of Yarbrough did not arise from the statute enforcing it. Nor did it arise, unless as a special protection accorded Negroes and not others by the Fifteenth Amendment, for the Court in that case itself finds that no new rights were created by the Fifteenth Amendment. *Cf. The Slaughterhouse Cases;* 16 Wall. 36 (1873); *Minor* v. *Happersett*, 21 Wall. 162 (1875). This being the case, freedom in the exercise of Yarbrough's right to vote was a pre-existing right of those who could vote before the passage of the Fourteenth and Fifteenth Amendments. This right, unless inherent as a privilege or immunity of United States citizenship most logically finds its source in the First Amendment. A strange anomaly would be presented if Appellants' rights were distinguished from those of the voters in *Yarbrough*. Assuredly voters for state offices have the same freedom as voters for United States officers. Assuredly the "necessity of the government" is as great for the States as for the United States. The right to vote, and of necessity the right to vote freely as well as equally, is protected by the Constitution "in state as well as federal elections." *Reynolds* v. *Sims*, 377 U.S. 533, 544 (1964).

Voting, then, is a privilege of individual citizens bestowed for the purpose of gaining the consent of the

governed by a *free expression* of their hopes and desires. Voting as a mode of expression, like others political and non-political, is exercised under the protection of the First Amendment, made applicable to the States by the Fourteenth. The words of Mr. Justice Jackson overturning the compulsory flag salute are equally applicable to compelled voting: "We set up government by the consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 641 (1943).

How much more essential it is to preserve freedom of the voter's choice than the right of school children to remain silent is clear because voting is "a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886); *Reynolds* v. *Sims*, 377 U.S. 544, 562 (1964). Like the flag salute statute, the requirement of § 23-357 that persons vote for ten State Representatives in Richland County "requires affirmation of a belief and an attitude of mind." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 633 (1943).

The effect of § 23-357, South Carolina Code, is to impair substantially the freedom of choice of South Carolina voters regardless of party in elections in which the words "or less" are applicable. To require a voter who chooses to vote only for a single candidate where there are more than one person to be elected is to impair the voter's freedom of choice, because he is thereby required to vote against the candidate of his choice. This is equally true whether the single candidate chosen to receive a vote is a single candidate running against a slate, *or a single nominee from a slate*. Directly in point is *Griffin* v. *Tapp*, 53 S.E. 2d 92, 205

Ga. 176 (1949). "The right to vote against some one is held as sacred by some as the right to vote for another, and the fact that an elector exercises both rights at the same time, when the opportunity to do so is afforded, would not render his ballot illegal and prevent it from being counted." *Griffin* v. *Trapp, supra*, 96. To the same effect is *Brannon* v. *Perkey*, 31 S.E. 2d 898 (1944). "A voter is not required to vote for every office to be filled at an election." *d.* at 902, citing Cooley, *Constitutional Limitations*, 1388 (8th ed., 1926). And the Supreme Court of Missouri, overturning a poll tax law framed so as to penalize non-voters: "In the exercise of the right of suffrage a voter is sovereign and has the right to vote or to refrain from doing so. If it were otherwise the right would cease to be sovereign . . . That it is not within the power of any legislative authority, national or state, to compel the citizen to exercise his sovereign right, seems to have been the common understanding of our people from the beginning of our national existence." *Kansas City* v. *Whipple*, 38 S.W. 295, 296, 136 Mo. 47 (1896). The Missouri constitutional provision so interpreted was substantially the same as that of South Carolina, "All elections shall be free and open and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public offices." S.C. Const., Art. I, § iv. Also see *People* v. *Deatherage*, 81 N.E. 2d 581 (1948) to the same effect. The true purpose of an election in South Carolina, or elsewhere, is "to ascertain and declare the will of the majority." *Easler* v. *Blackwell*, 10 S.E. 2d 160, 195 S.C. 15 (1940); *Redfearn* v. *Board of State Canvassers*, 107 S.E. 2d 10, 234 S.C. 113 (1959). "If we are to follow the principle that effect must be given to the intent of the voter

where such intent can be determined with reasonable certainty, we must do so by giving as much effect to his intent not to vote, or to cancel his vote, as we do respecting his intent to cast a vote." *Petition of Wade*, 121 A. 2d 551, 553; 30 N.J. Super. 510 (1956). Liberty of electoral choice is thus denied whether the voter yields to the compulsion of § 23-357 and votes for those he does not prefer or whether he refuses to yield to the compulsion of § 23-357 and forfeits his expressed choice by the invalidation of his ballot.

The effect of § 23-357, taken as a whole, is to require the voter on pain of not having his vote counted, to vote for persons he does not prefer and for whom he does not in truth freely choose to vote. This compulsion of § 23-357 exists whether the petitioners make the Hobson's choice of voting for eight Democrats or for eight write-in candidates. The availability of write-in possibilities and the requirement of this alternative to voting for Democratic candidates is still a denial of the freedom of petitioners to vote, to vote for whom they choose, or not to vote at all.

Nor may this denial of constitutional right be justified on the ground, as the District Court would have it, that it is a legitimate policy to stimulate political participation and avoid factionalism within a party. Again, Mr. Justice Jackson might have been speaking of this contention when he wrote: "Unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievements. . . . To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the ap-

peal of our institutions to free minds .... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 640, 641, 642 (1943).

If South Carolina may without infringing the First and Fourteenth Amendments require Richland County voters to vote for ten State Representatives, whether party nominees, independents, or write-ins, it may require that a voter vote for all candidates on a ballot. If South Carolina may constitutionally invalidate the votes cast for fewer than ten State Representatives in Richland County, it may require invalidation of a voter's entire ballot unless he casts a vote for every office to be filled. The effect of such requirements should the entire State Legislature, as well as Congressmen, be elected at large makes of voting a chore which staggers the imagination. Voters can hardly be expected to make intelligent choices while filling blanks for every office on a ballot as big as a bed-sheet.

"[F]reedom from duress is guaranteed to every citizen as he makes up his mind, chooses his party, and finally casts his vote. During that process, no governing body may use force upon him, may try to drive him or lure him toward this decision or that, or away from this decision or that .... [The First Amendment] expresses the constitutional authority, the legal power, of one who governs to make up his own mind without fear or favor, with the independence and freedom in which self-government consists." Meiklejohn, Political Freedom, 119-120 (1960). The preservation of

self-government depends upon the elimination of initial encroachments upon its bases. The guaranty of equality of voting without a guaranty of liberty of voting choice merely sets the rabbit to guard the lettuce patch.

B. Liberty of political choice to vote for all, some, or none of existing candidates, or for no candidate is additionally and specially guaranteed against abridgement by the Fifteenth and Nineteenth Amendments.

"The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women." *Gray* v. *Sanders*, 372 U.S. 368, 379 (1963). Denial of liberty of political choice abridges the right to vote, since voting under any degree of duress loses all sanctity and becomes valueless, both to the voter and to the society. It is in this wise that the right of Appellant Ellis and of women voters similarly situated is abridged. The Nineteenth Amendment, like the Fifteenth, protects not only against positive discrimination, but must work as well to put women and Negroes upon the same footing of freedom in casting their votes as was enjoyed by white males before the passage of the Amendment. That the Fifteenth Amendment has this affirmative thrust, as well as a negative thrust more commonly attributed to it, is confirmed by the Court's statement that Negroes under the Amendment were as respects voting to have "the same right as white persons." *Ex parte Yarbrough*, 110 U.S. 651, 665.

It has been held that no new rights were created by these Amendments, but that their force is to remove impediments which otherwise the States could impose

as qualifications. The removal of impediments would be incomplete if only those relating to qualification were removed, while still permitting the imposition of impediments in the voting booth, including impediments to freedom of choice. In short, two great classes of voters are specially and additionally protected from differentiation in choosing candidates and casting ballots for them by the Fifteenth and Nineteenth Amendments.

In considering a statute's restrictive effect upon personal liberties protected by the Constitution, the Court "has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940); *Winters* v. *New York*, 333 U.S. 507, 518-520 (1948); *NAACP* v. *Button*, 371 U.S. 415, 432 (1963); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 516 (1964). Because voting rights are such "personal rights," *U. S.* v. *Bathgate*, 246 U.S. 220, 227 (1918); *Reynolds* v. *Sims*, 377 U.S. 533, 561 (1964) it is not inappropriate to advert to other possible applications of § 23-357 than those involved in the case at bar. South Carolina, like other Southern States, possesses significant numbers of Negro voters. Applying § 23-357 to primaries of the Democratic Party, for example, a Negro candidate for nomination to the House of Representatives, competing against ten white candidates for ten seats in the State House, would find nomination almost impossible, as ten votes would be required for the Negro candidate to equal one vote for any white candidate, regardless of how the voters for the Negro candidate disposed of their nine compelled votes. Should Negro voters exercise their freedom of political choice, doubly protected by the Constitution, by voting

only for the Negro candidate, their votes would be nullified by the application of § 23-357.

In a parallel situation, women who exercised their right to vote freely by voting only for a woman candidate, would find that § 23-357 accomplished the same abridgement of their voting rights as that suffered by Negroes. It is for this protection of the Nineteenth Amendment that Appellant Ellis contends. There is no contention that women are entitled by that Amendment to have women candidates on the ballot, but it is contended that the Nineteenth Amendment as well as the First and Fourteenth Amendments protect women in the right to choose to vote for women candidates, as the Fifteenth protects the right of Negroes to vote for Negro candidates.

True, as the District Court said, the statute is sexless. It is also raceless. But it holds high potential for the concentration of control of the Democratic primary, until recently, as Appellee correctly states, "the only meaningful election in South Carolina" (Motion to Affirm, 4) in white, male Democrats. Its potential for contral of general elections by the same white, male Democrats is hardly less. That same potential exists for the control of the entire electoral process with regard to any minority group or groups.

II.

Equal representation is denied and majority rule is left to chance by the type of gerrymander imposed by § 23-357.

The Court has held three different types of gerrymander to fall within Constitutional inhibitions: *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Gray*

v. *Sanders*, 372 U.S. 368 (1963); *Reynolds* v. *Sims*, 377 U.S. 533 (1964). These factual contexts might be described respectively as gerrymander by exclusion, gerrymander by sublimation of the popular vote, and gerrymander by disproportionate representation. Appellants urge that § 23-357 creates a gerrymander by inclusion, which results in unequal representation because of the requirement that persons waste votes. Cf. Hacker, *Congressional Districting*, 46-63, especially 49 (1963). Where one party fails to nominate a complete slate of candidates for a multi-member district, the application of § 23-357 requires that voters of that party waste votes in some fashion, either by write-in or by a vote for the candidate or candidates of another party. Thus, "one man, ten votes" in the context of the case at bar does not represent the same necessary equality of voting power as is required by the "one man, one vote" principle of *Gray* and *Reynolds*. Not only does South Carolina law not require a party to nominate full slates of candidates for multi-member districts, but research fails to disclose any such requirement in the law of any State. Absent such a requirement, the necessity of wasting some votes to preserve others not only impairs the equal basis of representation, but leaves majority rule to chance. Here, as in *Gomillion*, the situation may be one in which a minority political group threatens the control of the statewide majority in an area of the state. Here, rather than the exclusion of the minority from the local political area, as in *Gomillion*, or the division of the local area into smaller areas (single-member districts) which would guarantee some majority group representation and some minority representation, the tendency toward unequal representation inherent in a multi-member district is enhanced by § 23-357.

Because the purpose and effect of the gerrymander is to maximize the effectiveness of one group's voting power and minimize that of another group, whether racial, ethnic, or political, the suggestion in the Government's *amicus curiae* brief in *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656 (1964) that it is possible to consider equality of representation while laying aside the question of the gerrymander is unrealistic and is conceptually impossible. The practical results of the attempt to deal with equality of representation without the gerrymander problem is to retain the conditions that prevent equality of representation but to require geographic rearrangement alone. A bare majority of even a dominant minority, as in *Gomillion*, whether a minority of race, political persuasion, or occupation, can achieve as much as 100% representation in a multi-member legislative district by the gerrymander of inclusion, involved in *Boineau*, *Fortson*, and *Drew*, as easily as by the gerrymander of exclusion, of sublimation of votes into units, or of disproportionate representation. Rural representation in Alabama can not only be maintained in control, but increased by election of that State's legislature at large. The equality of voting strength attained thereby is illusory, if there is a majority of rural voters in the State. In such a situation, the application of a statute similar to § 23-357 would strengthen the probability of dominance by the rural voters because it would strongly tend to concentrate party control in the hands of the rural-dominated party organization. This tendency exists at the level of the primary election regardless whether the state is dominated by a single party or has a strong two-party system.

At the level of the general election, a statute of the type of § 23-357 would have the same effect of disproportionately increasing the voting strength of a heavily dominant majority. But in areas, state or other electoral division, where there is even a moderately developed two party system *the application of such a statute leaves majority rule to chance even if both parties nominated full slates* of candidates for all multiple-candidate offices. The death or other disqualification of one person from a slate on election day or too soon before to permit the replacement of a candidate as provided by law, would in all probability result in the invalidation of many votes cast for the slate of which the deceased was a part. It should be observed that § 23-357 applies not only to legislative delegations, but also to slates of Presidential Electors, and municipal councillors. It would also apply to election of United States Congressmen should the State decide to elect its national representatives at large. The effect of a statute like § 23-357 in States in which a substantial minority elects some Congressmen in single-member districts should the state-wide majority decide upon election at large rather than reapportionment is apparent.

It is because the vice of § 23-357 is felt in multi-member constituencies, and has no effect except as to voter intent in single-member districts, that Appellants feel that *Boineau* is intimately related to *Fortson* and *Scranton*. All three involve applications of *Reynold*, that arise from the existence of multi-member legislative constituencies. Appellants are at a loss as to why, if the questions raised by *Fortson* and *Scranton* are open, the question in *Boineau* as to voters rights is satisfactorily closed by the opinion of the District

Court. § 23-357 piles the Ossa of compulsory voting on the Pelion of the multi-member district. Can Ossa hang suspended unless it is the purpose of the affirmance to teach that the guaranties of free expression of the First Amendment extend only to the point where they are most crucial: the ballot box? Appellants are loath to believe that this question would be disposed of without plenary consideration, if indeed the answer is not so clear as to warrant summary reversal of the District Court.

III.

Equal protection of the laws is denied by the enforcement of the words "or less" of § 23-357, South Carolina Code, because those words have no reasonable relation to the legitimate purpose of the statute, which is determination of the intent of the voter.

Appellees admit that "one of the purposes" of § 23-357 is to authorize that a vote not be counted where it is impossible to determine the voter's choice for an office to be filled. This admission raises unavoidably the question of what other legislative purpose or purposes could exist, and whether these are legitimate ones under the Constitution of the United States. The District Court found that the purpose of the statute was to encourage voter participation and avoid factionalism. It is abundantly clear, however, that as desirable as voter participation may be, compelled voting under § 23-357 is not a constitutionally acceptable method of its achievement, abridging as it does the fundamental freedom of electoral choice upon which our institutions rest and which is protected by the First and Fourteenth Amendments. Further, this alleged legislative purpose is not evident in regard to other

elections than those for multi-candidate offices. As regards single-candidate offices, such as that of Governor, the statute speaks only the language of voter intent, being completely inapplicable in other sense to such offices. Not only is it unlikely that a legislative purpose of assuring increased voter participation exists in a statute effective in one type of office and not in others, but the very terms of § 23-357 negative this purpose. It is difficult to see how the disfranchisement which § 23-357 imposes as a penalty for failure to participate fully in the election supports this ostensible purpose.

Rather, the legislative history of the statute tends to support the belief that an entirely different, yet still illicit, purpose accounts for the anomalous words "or less." Appellant has pointed out that the present § 23-357 was adopted in 1950, embodying one of the 1928 Rules of the Democratic Party of the State. (Motion to Affirm, 4). It is of great significance in determining the legislative purpose in the adoption of § 23-357 that certain key rules of the Democratic Party were held unconstitutional in 1947 and 1948. *Rice* v. *Elmore*, 165 F. 2d 387 (1947), certiorari denied, 333 U.S. 875 (1948); *Brown* v. *Baskin*, 78 F. Supp. 933 (1948). If the purpose of the adoption of § 23-357 was to accomplish the purpose of the unconstitutional rules, restraint on Negro participation in the Democratic primary, this surely is inadmissible as a legitimate purpose to sustain the inclusion of the words "or less" in what is otherwise a statute directed to the determination of voter intent. That restraint on Negro participation is a major effect of the statute is beyond doubt. *Cf.* Greenberg, *Race Relations and American Law*, 152, (1959), considering similar statutes in relation to restrictions on Negro candidacies.

Because neither denial of freedom of political choice generally, nor restriction of Negro participation can constitutionally sustain the words "or less" of §23-357, the section speaks solely in terms of the purpose of authorizing votes not to be counted where it is impossible to determine the voter's choice and intent. The offending words not only have no rational relation, but no relation to the determination of a voter's choice and intent. Appellant has conceded that the State may constitutionally provide that a vote not be counted where it is in truth impossible from the method of voting to determine the voter's choice among candidates. Such an impossibility arises when the voter votes for *more* persons than there are offices to be filled; which of those would represent his choice is impossible to determine. The same is true if the voter votes for no candidate for an offiffice. Many states provide for the invalidation of votes where there are *more* persons voted for than offices to be filled or where it is otherwise impossible to ascertain the voter's choice. Some specifically provide that votes are not to be invalidated where fewer persons are voted for than offices to be filled. *E.g.*, § 3-1006, Arkansas Statutes (1956); § 15.-15.360(3), Michie's Alaska Statutes (1962); § 11-64, Hawaii Rev. Statutes (1955); § 24-266, Michie's Virginia Statutes (1950). Such specific provisions indicate recognition that *voting for fewer persons than offices to be filled is a clear expression of voter intent.* Because as much weight must be given to intent not to vote as to intent to cast a vote, *Petition of Wade*, 121 A. 2d 552, 30 N.J. Super. 520 (1956), the words "or less," of § 23-357 of the South Carolina Code have no relation to the impossibility of determining a voter's intent. His intent is clear: it is to vote for those voted for and no others. It is difficult to perceive how the

"collective intent of the entire electorate" (Motion to Affirm, 6) can be ascertained by distortion of the intent of individual voters, or the elimination of the opportunity to express any electoral intent at all. The determination of a "collective intent" that is greater than the sum of individual intentions is more than reminiscent of the Hegelian "true will" of the citizen, which that philosopher identified with the will of the State. This metaphysical concept of "true will" (or collective intent) was one of the keystones of Nazi tyranny.

Legislative establishment of classifications without a rational basis is a denial of equal protection of the laws. *Truax* v. *Corrigan*, 257 U.S. 312 (1921). Likewise, equal protection of the laws precludes irrational discrimination as between persons or groups in the incidence of a law. *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948). The rule of classification may not violate specific constitutional policy or introduce differentiations that are invidious or irrelevant to any tolerable purpose. This § 23-357 clearly does, by the words "or less". A class of voters whose votes are not to be counted is established by the offending words, the members of which are denied personal rights. That one elector may express his intent to vote for ten candidates and another not express his intent to vote for two, five, or seven, introduces a marked element of irrationality and irrelevance into the incidence of § 23-357, unless the violation of specific constitutional policy is permitted. The very irrelevance of the words "or less" to any tolerable purpose assuredly constitutes invidious discrimination against those who are partly disfranchised. Such discrimination, whether "ingenious or ingenuous" cannot pass muster under the Four-

teenth Amendment. *Smith* v. *Texas*, 311 U.S. 128, 132 (1940); *Cooper* v. *Aaron*, 358 U.S. 1, 17 (1958).

IV.

Equal protection of the laws is denied by §23-357, South Carolina Code, which, as construed and applied, places a variety of burdens upon the voting rights of Appellants and other voters similarly situated that are not placed upon other voters.

A. § 23-357 operates upon the basis of a constitutional irrelevance as to legislative purpose.

The legislative history of § 23-357, adverted to in argument above, supports the belief that the true legislative purpose of the section was by subtle and sophisticated means to counter the effects of the South Carolina White Primary Cases, *Rice* v. *Elmore* and *Brown* v. *Baskin*. But the Fourteenth Amendment forbids "sophisticated as well as simple-minded modes of discrimination". *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939); *Reynolds* v. *Sims*, 377 U.S. 533, 563. It is, of course, no defense for § 23-357 that while discrimination was the purpose, the section in actual practice does not discriminate against the intended group (if, indeed, it does not) but discriminates against another group. Nor, equally, is it a justification of discrimination in political rights that a political remedy may exist. *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736-737. From the standpoint of voters, many of whom may belong to no party, the action of a political nominating convention is a merely political remedy. The voter in South Carolina under § 23-357 stands in the same relation to the Republican nominating conventions that any United States voter stands in relation to the Democratic and Republican National Con-

vention. The former may as well be told by the voter "nominate ten candidates for the Richland County legislative delegation" as the latter may be told to nominate better or differently qualified persons for President. Moreover, the very discrimination that exists may prevent effective resort to the legislative process that can ordinarily be expected to bring about the repeal of unjust legislation.

Needless to say, with the exception of conspiratorial subversive parties, political belief "is constitutionally an irrelevance" like race, creed or indigence in legislative classification. *Edwards* v. *California*, 314 U.S. 160, 184 (1941). Yet the District Court found § 23-357 as a matter of fact to be discriminatory against persons who might wish to vote for certain candidates. Having made this finding, the District Court nevertheless dismissed because the discrimination was not invidious. Appellants submit that if political belief is "constitutionally irrelevant" as a basis for legislative classification, the act of putting political belief to work through the suffrage is also "constitutionally irrelevant" in this wise. This being true, the statute must fall without the necessity of a finding of indiviousness. Classification upon a "constitutionally irrelevant" basis is invidiousness by constitutional definition. Nor is a statute which classifies upon this "constitutionally irrelevant" basis one which operates upon all people equally, since § 23-357 imposes an orthodoxy of political act in voting which stifles heterodoxy in political belief. Duly qualified voters are entitled to exercise their franchise in a manner in which some do not suffer burdens not imposed on others by reason of their political belief or persuasion. Equality of political choice is assuredly at least as much "of the very essence of the

personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure" as is "the right to work for a living in the common occupations of a community." *Truax* v. *Raich*, 239 U.S. 33, 41 (1915).

B. § 23-357 imposes differing burdens among voters in the manner of voting, depending upon variation of political belief and preference, and debases the weight and effectiveness of some votes in comparison with others.

The enforcement of § 23-357 is accomplished in Richland County, with the exception of the counting of paper absentee ballots, by the manner in which voting machines are constructed. A device known as a lockout bar permits the counting of votes for State Representative when voting levers are depressed either for ten candidates named on the machine or for ten write-in candidates. Depressing the "straight ticket" lever at the top of the party column depresses levers for all candidates of that party, including all nominees of that party for State Representatives but depresses *only* such levers and prevents the depressing of *any other* levers, including write-in levers. If any party has fewer nominees for State Representative than the prescribed ten, the construction of the voting machine to enforce § 23-357 prevents voters from voting that straight-party ticket, or prevents his votes for State Representative from registering. Thus, the statute imposes upon certain voters not only the burden of depressing all levers for the party of his choice, but of familiarizing themselves with the operation of the voting machine to acquire safety from casting away his votes for State Representative under the impression that he is casting votes for them. The party which

has a full slate is the beneficiary, however, of the ability of its supporters to cast straight-ticket votes. This differentiation may in itself be only a minor inconvenience, but far more seriously discriminatory effects flow from it.

Voters who do not wish to vote for any nominees of the party with the full slate must write in the names of ten persons in order to vote for any person for State Representative, because no combination of votes for candidates named on the ballot and write-in candidates will release the lock-out bar. § 23-357 provides that write-in votes may not be cast for persons whose names appear as nominees. The determination of the State Board of Canvassers, among the appellees of record, that such votes will be counted does not alter the discriminatory force of the section in this regard. Compliance with the statute, which is evaded by the ruling of the Board of Canvassers when voting machines are used means necessarily that voters may not vote for two nominees of one party without voting for eight nominees of the other party. Voters, then, who do not choose to vote for any nominee from the full slate are required to violate the statute by write-in votes for candidates named by the party with less than a full slate or are required to forego voting for those candidates by depressing levers for them. Rigorous enforcement of the statute, to which appellees are sworn, requires that write-in votes for persons named on the ballot be invalidated, leaving other write-in votes also invalid for failure to cast valid votes for ten. A statute which as construed and applied, without evasion by the very authorities charged with its enforcement, requires a voter to vote eight times for the opponents of the candidates of his choice in order to cast two votes

for the candidates of his choice dilutes the effectiveness of that voter's vote in comparison with the effectiveness of a voter who can get full value of votes for ten candidates for whom he chooses to vote. This statute is no more than an attempt at legalized stuffing of the mechanical ballot box. This stuffing on behalf of the party with the full slate arises from the operation of the statute whether by the dilution and debasement of some votes in relation to others or by the failure to count the votes of some voters and not of others. Although more subtle in its operation than the denial of equal protection found in *Reynolds*, the discrimination imposed is undeniably sufficiently invidious, i.e., unjust, to bring the statute within the constitutional prohibition.

Assuming *arguendo*, which appellants emphatically do not concede, that appellees may forswear their duty to enforce § 23-357 according to its terms in order to avoid the expense of printing paper ballots or in order to avoid demonstrating the indiviously disriminatory effect of the section, the methods of voting for ten persons without voting for as many as eight nominees of appellees' party impose additional burdens on voters who wish to accomplish this purpose. It has been pointed out that to avoid casting at least eight votes for the party with the full slate of nominees, ten write-in votes must be cast, or the voting machine will count none. This requirement imperils the secrecy of voting in at least two ways: (1) because it takes appreciably more time to write-in ten names than to vote a straight ticket, those who spend a short time in the booth are readily identified as the party faithful; and (2) because the writing of ten names lends itself to the identification of persons who cast write-in votes by com-

parison with handwriting samples acquired in voter registration. A statute which so imperils the secrecy of the ballot is a powerful stimulus to voting as expected by the dominant group, smothering the expression of divergence of political beliefs.

Furthermore, the difference in time required for voting a straight ticket and a write-in ticket makes it possible for more voters to vote by the former method than by the latter. The statute permits stuffing the voting machine in this way, as well as by dilution of the weight of some votes.

In any event, a write-in vote is cast at the voter's peril, because § 23-357 requires write-in votes to be cast for *qualified* persons. The burden of determining that the party nominees are qualified does not, of course, fall on the straight-ticket voter. A write-in vote for a non-qualified person would presumably invalidate all other write-in votes cast by the voter.

Although appellants do not contend that there is a constitutional right to vote by voting machine, it is submitted that a statute which has one effect where voting machines are used and another where paper ballots are in use creates a differential burden upon the machine voter by making machine-voting more difficult and more susceptible to error than paper ballot voting. Indeed, an election statute which in its nature cannot be applied in the same manner to paper ballots and voting machines is of doubtful rationality. That the State Board of Voting Machine Commissioners may decide to revert to paper ballots to prevent some of the discriminations under § 23-357 is merely another political remedy to which voters are left by the District Court.

Voters who do not wish to vote for a complete ticket of the same party are placed in the position of having to cast a preferential ballot, where no means is provided for registering preferences. On the other hand, voters who wish to vote a straight ticket for a full slate will automatically have their preference: that is, equal preference based on party. For this reason, a majority of voters whose first preference is an independent may be unable to elect the person of their choice because of the additional weight to other candidates of their wasted votes. In this way, surely, majority rule is left to chance. The District Court relies upon *Farrell* v. *Hicken*, 125 Minn. 407, 147 N.W. 815 (1914) and *Orpen* v. *Watson*, 87 N.J.L. 69, 93 A. 853 (1915) in support of the proposition that compelled voting is not unconstitutional. In both these cases, however, the ballots involved were preferential in nature and voters were given the opportunity to express preferences among candidates in numerical order. Even conceding, which appellants do not, that the expression of preferences may be required, a statute which requires preferences without providing for their expression is clearly distinguishable from those involved in the cited cases.

In these respects, in the imposition of additional burdens upon some voters and not on others, the issues in this case are not unlike those raised in *Harman* v. *Forssenius*, No. 360, October Term, 1964, in which probable jurisdiction was noted October 5, 1964.

Nothing short of granting this petition stands between the imposition of the burdens described above in greatly magnified form throughout the state upon all voters other than the completely faithful party member. The statute would not be any more uncon-sti-

tutional were every voter required to vote for all 124 of the State's Representative under these conditions, but for many the burden of voting would be so great that a strong compulsion would arise not to vote for State Representatives at all, The imposition of the burdens of compulsory voting may result not in greater voting participation but in decreased participation induced by despair of casting an effective ballot.

The nature and cumulative effect of the difference in burdens imposed upon some and not upon others as related at length illustrates that hostility and oppressiveness of purpose in the legislation which is forbidden by the equal protection clause. *Kotch* v. *Pilot Comm'rs*, 330 U.S. 552, 556 (1947); *Cf. Perez* v. *Sharp*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

Because until most recently, the Democratic primary has been the only meaningful election in South Carolina, it is unlikely that the hostility and oppressiveness of purpose evidenced by the statute was directed at the Republican party. It is, however, common knowledge that Southern States have from time to time enacted legislation upon the political process which typically evinced hostility and oppressive purpose toward Negro participation in the process. There can be little doubt that Negroes are protected by the First and Fourteenth Amendments from such hostility and oppressive purpose, as well as by the Fifteenth. Surely appellants and others similarly situated can claim like protection. The view of Justice Miller in the *Slaughterhouse Cases* that the protection of the Fourteenth Amendment extended only to Negroes has long since been abandoned by the Court. The general applicability of the Amend-

ment was specifically recognized in *U. S.* v. *Mosley*, 238 U.S. 383 (1915), involving facts which accomplished with glaring cruelty the results which § 23-357 is designed to accomplish *suaviter*.

It should be emphasized that the elimination of the words "or less" would give no party and no voter an advantage over the other, which the District Court failed to appreciate in evolving its remarkable theory that the purpose of the statute is to *avoid* dilution of voting weight. Without the words "or less" in the statute, liberty of electoral choice would be preserved and equality of electoral choice restored. The assumption that one party would be aided in preference to the other is gratuitous, but more to the point is irrelevant. If parties are to be meaningful parts of the political process, what benefits the voter's rights benefits all parties equally, although certain party functionaries may be disadvantaged. In short, elimination of the words "or less" would place all voters, Democrat, Republican, independent, or confused in the same position and would eliminate a major source of confusion of the voter. In Richland County, each voter would be *equally free* to allocate his ten votes as he wished or not to use them or a part of them. Each voter would be *equally free* to choose to vote for any number between one and ten, from among the party nominees, or independent candidates, or write-in designees in any combination. This very concept of equality of choice is the fundamental question in *Fortson* and *Scranton*, and furnishes another linkage between these cases and *Boineau*.

CONCLUSION

For the above reasons, appellants respectfully pray that the order affirming the decision below be withdrawn and that alternatively the decision of the Court below be summarily reversed or the cause set for argument on the merits.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

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